No. 01-1437 (II)

In The

Supreme Court of the United States

SEP 26 2002
CLERK

BEATRICE BRANCH, *et al.*,

Appellants,

v.

JOHN ROBERT SMITH, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OF APPELLEES JOHN ROBERT SMITH, SHIRLEY HALL, GENE WALKER, AND MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

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QUESTIONS PRESENTED

1. Does Article I, § 4 of the United States Constitution permit a state court, in adjudicating a claim brought only under state law, to order its own congressional redistricting plan into effect when that State's Legislature has directed by statute that election of Representatives be conducted at large?

2. Where the law of a State covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, has previously provided that its courts may not entertain challenges to the manner of election of Members of the United States House of Representatives, must an order by its Supreme Court authorizing a trial court to impose a redistricting plan be reviewed and approved under § 5; and, if so, may the plan imposed by the trial court be reviewed under § 5 before the Supreme Court order granting jurisdiction has been approved?

3. Does this Court have jurisdiction under 28 U.S.C. § 1253 or 42 U.S.C. § 1973c to review the District Court's order of June 3, 2002, denying a motion filed after judgment which did not suspend the finality of that judgment, where appellants failed to file a notice of appeal within the time permitted by 28 U.S.C. § 2101 and this Court's Rule 18.1?

LIST OF PARTIES

Appellants:

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL.

Appellees:

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
JURISDICTION	1
STATUTES AND REGULATIONS	3
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	10
ARGUMENT	13
I. UNDER ARTICLE I, SECTION 4 OF THE CONSTITUTION, THE CHANCERY COURT HAD NO POWER TO IMPOSE A CONGRESSIONAL REDISTRICTING PLAN	13
A. States have no power over elections to Congress except that delegated by the Constitution	14
B. The Framers intended power to be exercised by legislative authorities subject to federal control, not control by other state authorities	17
C. The Chancery Court, resolving a claim brought solely under state law, improperly substituted its own plan of elections to Congress in place of two statutes adopted in accordance with the method the State has prescribed for legislative enactments	24
D. The District Court's ruling does not contravene *Growe v. Emison*	30

TABLE OF CONTENTS – Continued

Page

II. BECAUSE NO MISSISSIPPI CONGRESSIONAL DISTRICTING PLAN HAS BECOME LAW, THE DISTRICT COURT PROPERLY IMPOSED A PLAN 34

A. The District Court properly ruled that all three submitted changes required approval under § 5 of the Voting Rights Act 34

1. The order in *In re Mauldin* is enabling legislation under 28 C.F.R. § 51.15(b)(1) 35

2. The Chancery Court's unexplained disregard of the at-large election requirement of Miss. Code Ann. § 23-15-1039 is a voting change 41

B. The District Court properly agreed with the Department of Justice that consideration of intervenors' congressional redistricting plan was inappropriate under 28 C.F.R. § 51.35 43

C. The Department's April 1 letter properly found that consideration of any submission was premature 47

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Taylor, 2002 Ok. 59, 51 P.3d 1204 (2002) 30

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) ... 2, 36, 49

Baker v. Carr, 369 U.S. 186 (1962) 21

Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002) 29

Brady v. New Jersey Redistricting Comm'n, 131 N.J. 594, 622 A.2d 843 (1992) 33

Brecht v. Abrahamson, 507 U.S. 619 (1993) 30

Brumfield v. Brock, 169 Miss. 784, 142 So. 745 (1932) 7, 32, 35, 43

Bush v. Gore, 531 U.S. 98 (2000) 33

Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) 16

California Democratic Party v. Jones, 530 U.S. 567 (2000) 20

Carter v. Luke, 399 So.2d 1356 (Miss. 1981) 35

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 37

Colegrove v. Green, 328 U.S. 549 (1946) 21

Connor v. Waller, 421 U.S. 656 (1975) 42

Cook v. Gralike, 531 U.S. 510 (2001) 15, 16, 17

Cotlow v. Growe, 622 N.W.2d 561 (Minn. 2001) 32

County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983) 38

Foreman v. Dallas County, 521 U.S. 979 (1997) ... 37, 38, 45

TABLE OF AUTHORITIES – Continued

Page

Foster v. Love, 522 U.S. 67 (1997).....15

Garcia v. Uvalde County, 455 F. Supp. 101 (W.D.Tex. 1978), *aff'd mem.*, 439 U.S. 1059 (1979).....46

Georgia v. United States, 411 U.S. 526 (1973).....*passim*

Grills v. Branigin, 284 F. Supp. 176 (S.D. Ind.), *aff'd mem.*, 391 U.S. 364 (1968).....22

Growe v. Emison, 507 U.S. 25 (1993) .....*passim*

Hathorn v. Lovorn, 457 U.S. 255 (1982).....*passim*

Hawke v. Smith, 253 U.S. 221 (1920).....20

In re Mauldin, No. 2001-M-01891 (Miss. Dec. 13, 2001).....*passim*

Jepsen v. Virgil-Giron, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M., Jan. 2, 2002).....30

McPherson v. Blacker, 146 U.S. 1 (1892) 16

Morris v. Gressette, 432 U.S. 491 (1977).....45, 48

National Ass'n for the Advancement of Colored People v. New York, 413 U.S. 345 (1973)..... 3

Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916)..... 10, 19, 20, 21, 28

Perrin v. Kitzhaber, No. 0107-07021 (Cir. Ct. of Multnomah Cty., Ore., Oct. 19, 2001).....30

Perry v. Del Rio, 67 S.W.3d 85 (Tex. 2001) 29

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).....38

Propper v. Clark, 337 U.S. 472 (1949).....42

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985).....32, 42

TABLE OF AUTHORITIES – Continued

Page

Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000).....45, 46

Scott v. Germano, 381 U.S. 407 (1965).....31

Smiley v. Holm, 285 U.S. 355 (1932).....*passim*

Stenberg v. Carhart, 530 U.S. 914 (2000).....42

Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002).....39, 40

Stone v. I.N.S., 514 U.S. 386 (1995).....1, 2

Texas v. Cobb, 532 U.S. 162 (2001).....30

U.S. Term Limits, Inc., v. Thornton, 514 U.S. 779 (1995).....14, 15, 16

United States v. Classic, 313 U.S. 299 (1941) 16

United States v. Louisiana, 952 F. Supp. 1151 (W.D. La.), *aff'd mem.*, 521 U.S. 1101 (1997).....38

Upham v. Seamon, 456 U.S. 37 (1982).....22

Waste Control Specialists, LLC, v. Envirocare of Texas, Inc., 199 F.3d 781 (5th Cir. 2000).....27

Wesberry v. Sanders, 376 U.S. 1 (1964).....17, 24

Wood v. State ex rel. Gillespie, 169 Miss. 790, 142 So. 747 (1932) 7, 35, 43

Wyche v. Madison Parish Police Jury, 769 F.2d 265 (5th Cir. 1985) 23

Zachman v. Kiffmeyer, 629 N.W.2d 98 (Minn. 2001).....29

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND RULES

U.S. Const. Art. I, § 2 ..... 17, 23, 24, 30
U.S. Const. Art. I, § 3 18
U.S. Const. Art I, § 4 ..... *passim*
U.S. Const. Art. I, § 8 18
U.S. Const. Art. II, § 1 ..... *passim*
U.S. Const. Art. IV, § 3 18
U.S. Const. Art. IV, § 4 18
U.S. Const. Art. V 18
U.S. Const. Art. VI 24
2 U.S.C. § 1 15
2 U.S.C. § 2a 5, 29, 50
2 U.S.C. § 7 15
28 U.S.C. § 1253 ..... 1, 3
28 U.S.C. § 1331 27
28 U.S.C. § 1441 27
28 U.S.C. § 2101 1
28 U.S.C. § 2284 5
Voting Rights Act of 1965, § 4, 42 U.S.C. § 1973b 3
Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c ..... *passim*
Voting Rights Act of 1965, § 12, 42 U.S.C. § 1973j 45
42 U.S.C. § 1983 5
28 C.F.R. § 51.10 40

TABLE OF AUTHORITIES – Continued

Page

28 C.F.R. § 51.12 36
28 C.F.R. § 51.13 ..... 4, 36, 38
28 C.F.R. § 51.15 ..... *passim*
28 C.F.R. § 51.22 ..... 4, 44, 47
28 C.F.R. § 51.23 40
28 C.F.R. § 51.29 39
28 C.F.R. § 51.35 ..... 4, 12, 43, 44, 47
28 C.F.R. § 51.36 39
Fed.R.Civ.P. 60(b) 1
Miss. Const. Art. 4, § 33 (1890) 23, 48
Miss. Const. Art. 6, § 152 (1890) 32
Miss. Const. Art. 6, § 159 (1890) 32
Miss. Const. Art. 13, § 254 (1890) 32
Miss. Code Ann. § 9-5-81 (Rev. 1991) 32
Miss. Code Ann. § 23-15-1037 (Rev. 2001) 5, 8, 25
Miss. Code Ann. § 23-15-1039 (Rev. 2001) ..... *passim*
1892 Miss. Code § 3690 43
1986 Miss. Gen. Laws ch. 495, § 308 25

MISCELLANEOUS

Department of Justice, *About Section 5 of the Voting Rights Act*, "Section 5 Requirements," <http://www.usdoj.gov/crt/voting/sec_5/types.htm> 37

TABLE OF AUTHORITIES – Continued

Page

4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (2d ed. 1888) 19

Epstein, *Symposium: Bush v. Gore: "In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U.Chi.L.Rev. 613 (2001) 23

FEDERALIST No. 59 ..... 17, 18

McConnell, *Symposium: Bush v. Gore: Two-and-a-Half Cheers for Bush v. Gore*, 68 U.Chi.L.Rev. 657 (2001) 26

R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE (8th ed. 2002) 3

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed. 1858) 14, 16

JURISDICTION

Because appellants, who were intervenors in the District Court, timely filed a notice of appeal, this Court has jurisdiction under 28 U.S.C. § 1253 to review the District Court's final judgment of February 26, 2002. App. 1a.[1]

On April 23, 2002, intervenors filed a new motion for a declaration that their congressional redistricting plan, which had been adopted by the Chancery Court for the First Judicial District of Hinds County, Mississippi, on December 31, 2001, App. 113a, had been approved as a matter of law under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. J.App. 30. The District Court denied that motion by order of June 3, 2002. J.App. 37. Although intervenors seek review of that order in Part II.A of their brief, they never filed the notice of appeal required by this Court's Rule 18.1 within the time permitted by 28 U.S.C. § 2101. Under these circumstances, it appears unlikely that this Court has jurisdiction to consider the effect upon the original judgment of the subsequent actions cited by intervenors.

There appears to be no reported decision in which this Court has considered its jurisdiction under § 1253 to review a postjudgment order of a district court resolving a motion which does not affect the finality of the underlying judgment. However, considering another statutory scheme of jurisdiction in *Stone v. I.N.S.*, 514 U.S. 386 (1995), this Court reasoned by analogy from the practice governing appeals to the courts of appeals of orders denying motions for relief under Fed.R.Civ.P. 60(b). "The denial of the motion is appealable as a separate final order. . . ." *Id.*, at 401. This Court then described the general rule which

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[1] The citation "App." refers to the Appendix to the Jurisdictional Statement in this appeal. The citation "J.App." refers to the Joint Appendix prepared for this appeal and the separate cross-appeal, *Smith v. Branch*, No. 01-1596, pursuant to this Court's Rule 26.

Congress would have had in mind when adopting the particular jurisdictional scheme at issue:

> Motions that do toll the time for taking appeal give rise to only one appeal in which all matters are reviewed; matters that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated.

Id., at 403.[2]

Although intervenors did not specify the authority under which they filed their postjudgment motion, that motion plainly did not toll the time for appealing the original judgment; indeed, that judgment had already been appealed. In all likelihood, the motion was filed under Rule 60(b), which an appellant may file "[e]ither before or after filing his appeal." *Id.*, at 401.[3] As *Stone* suggests, Congress would have understood in adopting § 1253 that appellate review of an order resolving such a motion would ordinarily require a separate appeal.

There may be some question as to whether the order of June 3 is appealable at all, as it neither granted nor denied "an interlocutory or permanent injunction," within the language of § 1253. However, the language of § 5 of the Voting Rights Act is broader, declaring that "any appeal shall lie to the Supreme Court." *See Allen v. State Bd. of Elections*, 393 U.S. 544, 561-63 (1969). In light of *Allen*,

[2] In *Stone*, because the statute in question authorized the consolidation of two separate appellate proceedings, this Court concluded that a motion for reconsideration of a deportation order did not affect the finality of that order or stay the time for filing an appeal therefrom. The deportation order and the order resolving the reconsideration motion required separate appeals, to be consolidated by the reviewing court. *Id.*, at 400-01.

[3] Arguably, the conduct of the Department of Justice after February 26 might be considered "newly discovered evidence" under Rule 60(b)(2) or "any other reason justifying relief from the operation of the judgment" under Rule 60(b)(6).

this Court's jurisdiction over § 5 appeals has been described as "unrestricted." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 2.10(d) at 101 (8th ed. 2002). Applying the similar appellate language of § 4(a) of the Voting Rights Act, 42 U.S.C. § 1973b(a), this Court entertained an appeal from an order denying intervention in *National Ass'n for the Advancement of Colored People v. New York*, 413 U.S. 345 (1973), and suggested that the statutory words "any appeal" could be broad enough "to include review of any meaningful judicial determination made in the progress of the § 4 lawsuit." *Id.*, at 353-54. In light of these precedents and the broad language of § 5, it seems likely that review of the June 3 order lies within the appellate jurisdiction of this Court, and of no other.

Because the District Court's order of June 3 is appealable under § 5, and because intervenors have not perfected a separate appeal from that order, the issues raised by their motion of April 23 are not properly before the Court.

STATUTES AND REGULATIONS

Jurisdiction over this appeal exists under two statutes. The first is 28 U.S.C. § 1253, which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Jurisdiction is also provided by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which provides in pertinent part:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

The resolution of the statutory issue raised by intervenors in their appeal requires consideration of certain portions of the Attorney General's regulations governing

administration of § 5 of the Voting Rights Act. 28 C.F.R. § 51.15 provides in pertinent part:

> (a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political subunits to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.
>
> (b) For example, such legislation includes –
>
> (1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13. . . .

28 C.F.R. § 51.22 provides in pertinent part:

> The Attorney General will not consider on the merits:
>
> (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or
>
> (b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance. . . .

28 C.F.R. § 51.35 provides in pertinent part:

> The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include . . . premature submissions (see §§ 51.22, 51.61(b)). . . .

STATEMENT OF THE CASE

Plaintiffs in this action are three Mississippi voters. The complaint they filed in the United States District Court for the Southern District of Mississippi on November 1, 2001, had nothing to do with the Voting Rights Act of 1965. Instead, proceeding under 42 U.S.C. § 1983, they sought to enjoin the enforcement of Mississippi's statute requiring election of five Members of the United States House of Representatives, Miss. Code Ann. § 23-15-1037 (Rev. 2001), because Mississippi had lost a seat as a result of the 2000 census. Plaintiffs asked the Court to order Representatives to be elected at large, as required by 2 U.S.C. § 2a(c)(5) and Miss. Code Ann. § 23-15-1039 (Rev. 2001). In the alternative, they asked the Court to devise its own plan dividing the state into four districts. They named as defendants the Mississippi Republican Executive Committee and the Mississippi Democratic Executive Committee, who administer the Mississippi statutes governing nominations to Congress, as well as Governor Ronnie Musgrove, Attorney General Mike Moore, and Secretary of State Eric Clark, who administer general elections in their capacities as members of the State Board of Election Commissioners. On November 8, 2001, plaintiffs filed their motion for preliminary injunction. By order filed November 21, 2001, the Chief Judge of the United States Court of Appeals for the Fifth Circuit constituted a three-judge District Court, pursuant to 28 U.S.C. § 2284.

On November 29, 2001, Beatrice Branch and six other voters moved to intervene as defendants. Intervenors, who are appellants here, alleged that they were plaintiffs in a separate action before the Chancery Court of the First Judicial District of Hinds County, Mississippi, which sought a judicially imposed congressional redistricting plan. Their amended complaint in the Chancery Court, attached as an exhibit to their intervention motion in the District Court, named only the three elected state officials

as defendants; the executive committees of the two political parties were not joined.[4] They asked the District Court to defer to the proceedings scheduled to be held in Chancery Court.

On December 5, 2001, the District Court granted the motion to intervene, and denied a motion to dismiss that had been filed by the elected state officials. App. 108a. The Court deferred ruling on the motion for preliminary injunction, noting that *Growe v. Emison*, 507 U.S. 25 (1993), acknowledges the primary responsibility of state officials to conduct congressional redistricting. However, the Court continued:

> We are, nevertheless, mindful of the fact that March 1, 2002, is the qualifying deadline for congressional candidates in Mississippi, and that any redistricting plan developed and adopted by State authorities must be submitted to the United States Department of Justice for preclearance. We are also mindful that the Department of Justice has sixty days to enter its objection to any plan adopted by the State authorities and if the Department of Justice objects to the plan, there is little or no possibility that the filing date of March 1 can be met. Furthermore, we think it imperative to have a plan in place by the qualifying deadline so that all election laws of the State of Mississippi can be met in a timely fashion in order to avoid candidate and voter confusion that results from the flux of delays, date changes, and continuances.
>
> Accordingly, if it is not clear to this court by January 7, 2002, that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction and proceed expeditiously to rule on the Plaintiffs' Motion for Preliminary Injunction, and if necessary, we will draft and implement a plan for reapportioning the state congressional districts.

App. 108a-109a.

[4] Although intervenors had filed their complaint and amended complaint in October, they served no process upon the named defendants until November 2, 2001, the day after plaintiffs filed this action in the District Court.

The next day, the Chancery Court responded to the District Court's pronouncement by signing an order accelerating its trial date to December 14, 2001, instead of the previously announced January 14, 2002. App. 175a-177a. On December 7, 2001, the Chancery Court *sua sponte* reconsidered and vacated its prior order granting the motion of the elected state officials to join the executive committees of the two political parties as indispensable defendants. That same day, Carolyn Mauldin and three other voters, who had been permitted to intervene as defendants in the Chancery Court, joined the Mississippi Republican Executive Committee in filing a petition for writ of prohibition with the Supreme Court of Mississippi, challenging the Chancery Court's jurisdiction over the complaint. On December 11, the three defendant state officials filed a similar petition. Both petitions emphasized that the Supreme Court had held for 70 years that Mississippi trial courts had no jurisdiction to adjudicate disputes over congressional redistricting. *Brumfield v. Brock*, 169 Miss. 784, 142 So. 745 (1932); *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 142 So. 747 (1932).

On the evening of December 13, 2001, hours before the Chancery Court was scheduled to begin trial the next morning, the Supreme Court entered an order in *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001). App. 110a. The order declared:

> After due consideration the Court finds that the Hinds County Chancery Court has jurisdiction of this matter. . . . Any congressional redistricting plan adopted by the chancery court in cause no. G-2001-1777 W/4 will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature.

App. 111a. The Court issued no opinion.

In light of developments in state court, plaintiffs on December 17, 2001, filed a motion reiterating their claim for a preliminary injunction and seeking to amend their complaint. Plaintiffs sought to allege that developments after the filing of their initial complaint had violated § 5 of the Voting Rights Act. First, they contended that *In re Mauldin*, by reassigning authority to make redistricting decisions to the Chancery Court, constituted enabling legislation within the meaning of 28 C.F.R. § 51.15 and therefore required approval under § 5. Second, they asserted that any redistricting plan ordered by the Chancery Court would itself require approval under § 5. Third, any failure by the Chancery Court or the official defendants to follow § 23-15-1039 requiring elections at large would also constitute a change requiring approval. After a hearing on December 28, 2001, the Court entered an order granting leave to amend on January 7, 2002, and plaintiffs filed their amended complaint the next day.

In an order entered January 15, 2002, the District Court agreed that *In re Mauldin* constituted a change requiring approval under § 5. App. 97a. The Court also ruled that the redistricting plan devised by the Chancery Court plaintiffs and ordered into effect by its judgment of December 31, 2001, App. 113a, required approval under § 5, because it was "a change from the previous districting plan set forth in Miss. Code Ann. § 23-15-1037, and from the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for circumstances such as the present one." App. 98a. After discussing the likely difficulties in obtaining expedited consideration of these multiple changes by the Department of Justice, the Court concluded that "it now appears to be uncertain that the State authorities will have a redistricting plan in place by March 1." App. 104a. The Court therefore decided to "begin the process of holding hearings to fashion a congressional reapportionment plan for the State to assure that the election process operates on schedule and without temporal change." App. 105a.

Intervenors offer no criticism of the trial conducted by the District Court on January 28 and 29, 2002. Nor do they identify any legal defect in the remedial redistricting

plan announced by the District Court's opinion of February 19, 2002, App. 25a, and put into effect by its final judgment of February 26, 2002. App. 1a. Rather, intervenors contend that the Chancery Court judgment had already become enforceable on February 26 because the letter of February 14, 2002, from the Department of Justice requesting additional information from Attorney General Moore was insufficient to toll the running of the 60 days available for objection under § 5. They further claim that the Chancery Court judgment became effective at the latest on April 22, 2002, when the Department failed to object after Attorney General Moore's resubmission on February 19, 2002, a position that was rejected by the District Court's order of June 3, 2002. J.App. 37. Intervenors also attack the separate basis for the District Court's judgment, set forth in its opinion of February 26, 2002, App. 4a, that the Elections Clause of the United States Constitution, Art. I, § 4, by its delegation of power to the Mississippi Legislature, precluded enforcement of the Chancery Court's judgment.

Because of the specific challenges raised by intervenors on their appeal, the demographic details of the two plans have no relevance. Because intervenors emphasize that the Chancery Court's adoption of their plan would have created a black voting age population majority of 59.02% in District 2, Appellants' Brief at 5 n.2, it is worth noting that the District Court judgment creates a black voting age majority of 59.20% in District 2. App. 65a. At trial, plaintiffs and the Mississippi Republican Executive Committee objected unsuccessfully to the admission of the political statistics upon which intervenors continue to rely. Appellants' Brief at 9 n.5.[5] Because intervenors do not

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[5] Intervenors and their amici cannot quite agree on the import of these statistics. While intervenors claim that District 3 in their plan "slightly favored the Republican candidate," Appellants' Brief at 8, their amici acknowledge that the district "was regarded as either leaning Democrat or a political toss-up." Brief *Amici Curiae* of the National

(Continued on following page)

contend that those statistics have any relevance to this appeal, it is not necessary for this Court to review the propriety of their admission into evidence. Neither racial nor political considerations have any bearing on the issues raised by this appeal.

SUMMARY OF THE ARGUMENT

1. Under Article I, § 4 of the Constitution, the Framers delegated authority to regulate congressional elections to state legislatures and to Congress.

A. States have no inherent or reserved authority to regulate elections to Congress. No branch of state government has any authority over congressional regulations except the authority delegated by the Constitution or by Congress acting pursuant to the Constitution. Thus, the question presented by this case is not whether the Elections Clause *withdraws* authority from state courts, but whether it *delegates* authority to them.

B. In delegating authority to legislatures, the Framers were aware that circumstances might prevent the adoption of regulations necessary to conduct elections to Congress. The Framers delegated additional authority, not to the other branches of state government, but to Congress. Because states differ in the structure of their governments, this Court has occasionally considered whether particular state actors may play a role in regulating congressional elections. The Court ruled in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), that a popular referendum could displace a redistricting plan adopted by a legislature because Congress had so provided in the relevant enabling legislation. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court found a governor's veto sufficient to preclude enforcement of a redistricting plan adopted by a legislature because the veto was "in accordance with the

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Association for the Advancement of Colored People *et al.* [hereinafter "NAACP Brief"] at 13.

method which the state has prescribed for legislative enactments." *Id.*, at 367-68. Although *Smiley* holds that a state court has jurisdiction to adjudicate a federal challenge to a state regulation of congressional elections, it did not hold that state courts could entertain state law claims. Unreviewable discretionary authority exercised by state courts under state law would be antithetical to the Framers' determination to delegate such discretionary authority to state and federal legislators.

C. By imposing the redistricting plan which intervenors proposed, the Chancery Court displaced the judgment of the Legislature, expressed in Miss. Code Ann. § 23-15-1039 (Rev. 2001), that Representatives should be elected at large. Here, the complaint which intervenors filed in Chancery Court relied only on state law. The only state law claim that can possibly arise in the course of challenging the legislative regulation of congressional elections, other than the meaning of the regulation itself, is whether it has been properly adopted in accordance with regular legislative procedures. While it is true that any remedy imposed by a state court must comply with federal law, it does not follow that any claim can exist under state law which would allow a state court to enter a remedy in the first place. Recognition of these principles will not displace the authority of state courts to litigate redistricting claims, because all other such litigation in state courts seems to have raised federal claims.

D. The District Court's ruling does not contravene *Growe v. Emison*, 507 U.S. 25 (1993). The Minnesota court, unlike the Chancery Court here, adjudicated a federal claim. Whether or not the Minnesota Legislature delegated authority over redistricting to its courts, the District Court's opinion here does not preclude the possibility that other States may do so. The propriety of the use of special commissions to conduct congressional redistricting is not threatened by the District Court's opinion here.

2. Although intervenors find no fault in the redistricting plan adopted by the District Court, they claim that the Chancery Court plan became enforceable either before

or after the entry of the District Court's judgment because of the failure of the Department of Justice to interpose an objection under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. In fact, preclearance has never been obtained.

A. All parties agree that intervenors' redistricting plan, as adopted by the Chancery Court, requires preclearance under § 5. The District Court correctly ruled that the reassignment of jurisdiction over congressional redistricting to the Chancery Court was also a change within the meaning of § 5, because it constitutes enabling legislation "authorizing . . . officials of the State to institute any of the changes" in election procedures. 28 C.F.R. § 51.15(b)(1). Because the drafters of redistricting plans exercise an immense amount of discretion, it is important for the Justice Department to be satisfied that a change in authority is not likely to result in the exercise of discretion in a discriminatory fashion. Likewise, the Chancery Court's decision to disregard the at-large election requirement of § 23-15-1039 constitutes a voting change. The District Court rejected intervenors' contrary reading of the statute as a matter of state law.

B. Because the propriety of the Chancery Court's jurisdiction had not been resolved, the Department properly concluded that consideration of intervenors' redistricting plan was inappropriate under 28 C.F.R. § 51.35. The Department's questions in its letter of February 14, 2002, concerning the Chancery Court's jurisdiction did not constitute unwarranted administrative conduct. Because the reassignment of jurisdiction was a covered change, it was plainly within the Department's authority to resolve the propriety of that change before turning to the redistricting plan imposed by that Court. The letter of February 14 was therefore sufficient to toll the running of the 60 days under § 5, so that no change went into effect for lack of an objection.

C. After Attorney General Moore resubmitted the proposed changes by letter of February 19, 2002, the District Court enjoined the enforcement of the Chancery Court's judgment on constitutional grounds. The Department

properly concluded in its letter of April 1, 2002, that consideration of the changes was inappropriate in light of the pending injunction. Section 5 only allows consideration by the Attorney General when a covered jurisdiction "shall enact or seek to administer" any change in voting practices. Only the Legislature, not the Chancery Court, can enact a law, and the Chancery Court did not seek to administer its own judgment, having instructed the defendant state officials to do that. But those officials no longer seek to administer that judgment, because they have not appealed the District Court's injunction. Because the Department properly concluded that submission under § 5 was inappropriate in these circumstances, the failure to object within 60 days did not place intervenors' redistricting plan into effect.

ARGUMENT

I. UNDER ARTICLE I, SECTION 4 OF THE CONSTITUTION, THE CHANCERY COURT HAD NO POWER TO IMPOSE A CONGRESSIONAL REDISTRICTING PLAN.

The Framers of the Constitution did not choose to adopt permanent procedures to govern the election of Members of Congress. Instead, recognizing the likely need for flexibility as the nation would grow and change, they chose to delegate the authority to make and revise such regulations. Article I, § 4 of the Constitution declares in pertinent part:

> The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . .

The Framers delegated no authority to the courts of the several States. Because the District Court here properly found that the Mississippi Legislature had not delegated any of its authority to the Chancery Court, it properly

enjoined the enforcement of the Chancery Court's judgment. App. 7a.

A. States have no power over elections to Congress except that delegated by the Constitution.

The desire for change in the manner of election of Members of Congress, which the Framers anticipated, has manifested itself often over the course of the last decade. As States have sought to impose new requirements and regulations, this Court has frequently been asked to review their propriety. In each case, this Court has ruled that States have no inherent authority to regulate congressional elections; instead, their power to do so is delegated by the Constitution itself and must be exercised consistently with the Constitution and with acts of Congress.

In *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995), this Court considered an amendment adopted by the people of Arkansas to that State's constitution which precluded individuals from appearing on the ballot for the House of Representatives after serving three terms in that body or for the Senate after serving two terms there. After finding the issues to be justiciable, this Court examined the source of the State's power to impose such regulations. Rejecting the notion that such power was reserved under the Tenth Amendment, the Court said:

> As Justice Story recognized, "The state can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." 1 [J.] Story[, Commentaries on the Constitution of the United States] § 627 [(3d ed. 1858)].

514 U.S. at 802. The Court then went on to describe Art. I, § 4 as an "express delegation[] of power to the States to act with respect to federal elections." *Id.*, at 805. The Court concluded:

> [A]ny state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.

Id. The Court went on to reject the contention that the Arkansas amendment did not add new qualifications for office, but merely regulated ballot access within the authority delegated by Art. I, § 4. Describing the power delegated by the clause, the Court said, "The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office." *Id.*, at 832-33.

Three terms later, this Court unanimously affirmed in *Foster v. Love*, 522 U.S. 67 (1997), that state regulations must be consistent with regulations adopted by Congress. Describing the power delegated by Art. I, § 4, the Court said, "Thus it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Id.*, at 69, citing *U.S. Term Limits*, *supra*, 514 U.S. at 832-33. Because Congress in 2 U.S.C. §§ 1 and 7 required Representatives and Senators to be elected on the Tuesday after the first Monday in November, this Court invalidated that part of Louisiana's open primary law which allowed the election to be completed at a first primary in October.

Finally, in *Cook v. Gralike*, 531 U.S. 510 (2001), this Court reviewed a constitutional amendment adopted by the voters of Missouri to require identification on the ballot of those Members of Congress that had not supported term limits. Invalidating that regulation, this Court summarized its jurisprudence and made clear that no power to regulate congressional elections exists beyond that delegated by the Constitution:

The federal offices at stake "aris[e] from the Constitution itself." *U.S. Term Limits, Inc., v. Thornton*, 514 U.S., at 805. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *Id.*, at 804. Cf. 1 Story § 627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the union"). Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of Holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." Art. I, § 4, cl. 1; see *United States v. Classic*, 313 U.S. 299, 315 (1941). No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

Id., at 522-23.[6]

Here, the Chancery Court prescribed the method of election of Representatives by imposing a redistricting plan. Its judgment could be valid only if the Chancery Court found the power to do so "within the exclusive

[6] In *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), this Court discussed the similar power of state legislatures to provide for the appointment of Presidential electors, describing it as "a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Id.*, at 76. Whatever procedures a State may employ to review or revise the decisions of its legislature in other circumstances, this Court observed that the constitutional grant "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.*, quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

delegation of power under the Elections Clause." *Id.*, at 523. Thus, intervenors in Part I.C of their brief state the question backwards; the issue is not whether the Elections Clause *withdraws* authority from state courts, but whether it *delegates* authority to them.[7] As will be demonstrated hereafter, the District Court properly concluded that neither the Elections Clause nor the Mississippi Legislature delegated any such power to the Chancery Court. It therefore properly enjoined enforcement of its judgment.

B. The Framers intended power to be exercised by legislative authorities subject to federal control, not control by other state authorities.

The constitutional delegation of power to make redistricting decisions seems quite clear on its face. In FEDERALIST No. 59, Alexander Hamilton explained the necessity and propriety of legislative regulation of congressional elections:

> [I]t will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last

[7] *Wesberry v. Sanders*, 376 U.S. 1 (1964), did not address the delegation by Art. I, § 4 of the authority to make regulations to govern elections to Congress. Rather, this Court held that Art. I, § 4 does not insulate those regulations from review by the courts to determine their compliance with federal law, specifically Art. I, § 2. Here, the Chancery Court conducted no such review because intervenors, as plaintiffs in that court, raised no federal claim.

> mode has, with reason, been preferred by the convention.

It would have astounded the Framers to suppose that the state courts should have "a discretionary power over elections" to Congress, such as that exercised by the Chancery Court here.

The Framers delegated this authority not to the States, to be exercised as the States might choose, but quite specifically to state legislatures. Other provisions of the Constitution show that the Framers knew how to specify the state authorities to exercise particular powers. Besides authority over elections to Congress, seven other powers were given to the state legislatures: to appoint Senators (Art. I, § 3); to consent to land purchases by Congress (Art. I, § 8); to provide the manner for appointing presidential electors (Art. II, § 1); to consent to subdivision of a state (Art. IV, § 3); to seek national help during a domestic disturbance (Art. IV, § 4); to apply for a constitutional convention (Art. V); and to ratify amendments if Congress chooses that method (Art. V). Two of these – the power to fill Senatorial vacancies in Art. I, § 3 and to seek emergency national help in Art. IV, § 4 – explicitly provide for state *executive* gap filling. No discretionary power whatsoever is delegated to the state courts.

The Framers were quite conscious that state legislatures might be unable or unwilling to discharge the powers delegated to them by the Constitution. Hamilton in FEDERALIST No. 59 expressed particular concern that they might fail to provide for elections to Congress:

> Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.

Although the Framers could have assigned the power to cure legislative defaults to other state authorities, as they had in Art. I, § 3 and Art. IV, § 4, they chose instead to

place that responsibility in federal hands. Charles Cotesworth Pinckney explained to the South Carolina Legislature that this decision stemmed from the fear that local political disputes would cripple the national interest:

> [I]t is absolutely necessary that Congress should have this superintending power; lest, by intrigues of a ruling faction in the state, the members of the House of Representatives should not really represent the people of the state, and lest the same faction, through partial state views, should altogether refuse to send representatives to the general government.

4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 303 (2d ed. 1888).

The few judicial decisions to consider Art. I, § 4 have construed the term "legislature" broadly enough to include all of a State's legislative authorities, but not so broadly as to include the state courts. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court gave effect to a referendum conducted pursuant to Ohio law to invalidate a redistricting plan passed by its Legislature. This Court held that Art. I, § 4 did not preclude Congress from providing by statute that redistricting should be accomplished in the manner provided by state law. *Id.*, at 569-70. The Supreme Court of Ohio had construed its law to the effect that "the provisions as to referendum were a part of the legislative power of the state," *id.*, at 567, thus complying with the controlling congressional statute. This Court held that Congress intended to permit the States to employ referenda in the redistricting process and that Art. I, § 4 permitted Congress to do so. *Id.*, at 568-69.

In *Smiley v. Holm*, 285 U.S. 355 (1932), plaintiffs argued that the Constitution precluded the Governor of Minnesota from vetoing a redistricting plan adopted by that State's Legislature. This Court reasoned that Art. I, § 4 delegates the authority to make law and held "that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative

enactments." *Id.*, at 367-68. An examination of history confirmed that the Framers would have regarded the veto as a legitimate part of the legislative process to which the Constitution had delegated authority:

> At the time of the adoption of the Federal Constitution, it appears that only two states had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a council of revision. But the restriction which existed in the case of these states was well known. That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, § 7.

Id., at 368-69.

Davis and *Smiley* stand at most for the proposition that the electorate, exercising the referendum power, and the governor, exercising the veto power, may be considered to be among the state legislative authorities to whom redistricting power was delegated by Art. I, § 4, or by Congress acting pursuant to that provision.[8] By no means do those cases support the proposition that, when the Legislature fails to act, other state officials may exercise the "discretionary power over elections" to which Hamilton

[8] This Court has read *Davis* as resting on a congressional delegation of power, describing its opinion as holding that "Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated." *Hawke v. Smith*, 253 U.S. 221, 230 (1920). It has been recently suggested that, absent such an affirmative delegation from Congress, the Elections Clause would not permit a popular referendum or initiative to supersede regulations adopted by a legislature. *California Democratic Party v. Jones*, 530 U.S. 567, 602-03 (2002) (Stevens, J., dissenting).

referred. In both *Davis* and *Smiley* the Legislature had actually adopted a plan, but other state legislative authorities prevented it from becoming law. The result in neither case was the adoption of a new and different plan by other state authorities; in *Davis* the prior districting plan remained in effect, while in *Smiley* Representatives were elected at large because Minnesota had lost a seat.

Both *Davis* and *Smiley* were brought in state court to enforce federal claims. In *Davis*, the plaintiffs claimed that the referendum which disapproved the redistricting statute passed by the Ohio Legislature violated both the Elections Clause and the enabling act passed by Congress pursuant thereto. 241 U.S. at 567. The Ohio Supreme Court denied relief, and this Court affirmed. *Id.*, at 570. In *Smiley*, voters brought a federal claim in state court, arguing that the new statute had not been adopted consistent with the power delegated by the Elections Clause, because the Governor's veto denied the statute lawful effect under the regular legislative processes of the State. 285 U.S. at 361-62. Although the Minnesota courts denied relief, this Court reversed and barred enforcement of the Legislature's plan. *Id.*, at 372-73. Thus, *Smiley* holds that a state court has jurisdiction to adjudicate a federal challenge to a state regulation of congressional elections,[9] at least as a general rule.[10]

[9] A majority of this Court so read *Smiley* in *Colegrove v. Green*, 328 U.S. 549 (1946), in which Justice Rutledge's concurrence agreed with the three dissenters on that issue. *Id.*, at 564 (Opinion of Rutledge, J.); *id.*, at 573-74 (Black, J., dissenting). This Court explicitly endorsed that reading of *Smiley* in *Baker v. Carr*, 369 U.S. 186, 202 (1962).

[10] Congress, acting under the Elections Clause or some other delegated power, may preclude state courts from entertaining claims concerning congressional redistricting. Here, the District Court held that no Mississippi court could exercise jurisdiction over such claims until the Supreme Court's decision in *In re Mauldin* had been approved pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. App. 98a. As will be demonstrated in Part II.A.1 hereafter, the District Court correctly interpreted and applied § 5. While challenging the District

(Continued on following page)

It does not follow, however, that state courts or other state officials are free to exercise the discretionary power which the Elections Clause delegates to legislators. In *Grills v. Branigin*, 284 F. Supp. 176 (S.D. Ind.), *aff'd mem.*, 391 U.S. 364 (1968), plaintiffs successfully sued members of the Election Board to enjoin enforcement of an unconstitutional districting scheme. When the Indiana Legislature failed to pass a new scheme, the defendants asked the Court to authorize the executive branch defendants to draw the plan. The Court refused: "Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts." 284 F. Supp. at 180.

To permit other state officials affirmatively to substitute their discretion for that of the Legislature in redistricting matters might realize Pinckney's fear that the "intrigues of a ruling faction in a state" could produce a congressional election which "should not really represent the people of the state." Here, the leaders of the Mississippi Legislature declined to reach a political compromise, but continued their intrigues in their testimony before the Chancery Court. A federal rule which permits other state officials to resolve political quarrels in place of the Legislature decreases the likelihood that the Legislature will discharge the duties delegated to it by Art. I, § 4, and increases the likelihood that legislators may choose instead to seek political results from state judges.

Although this Court compels deference to the discretionary decisions of legislators operating under the Elections Clause, *Upham v. Seamon*, 456 U.S. 37 (1982), that Clause delegates no such discretion to state judges. Although Mississippi courts may enforce the law through equitable remedies, as intervenors contend, Appellants'

Court's interpretation of § 5, intervenors do not claim that Congress lacked the power to make that determination.

Brief at 27,[11] it is nonsense to suggest that law enforcement is part of "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367-68.[12] While a state court hearing a federal claim may also exercise remedial discretion, its judgment may be reviewed by this Court for errors of federal law. Here, the Chancery Court's declaration that "fairness to the incumbents is a paramount consideration," App. 131a, would be promptly corrected. *See Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."). By contrast, this Court would not be able to review an exercise of discretion under state law, except to assure compliance with minimal standards set by the federal Constitution and statutes. As they did in the District Court, *see* App. 30a-34a, intervenors would defend all exercises of the Chancery Court's discretion as determinations of state policy to which this Court must defer.[13]

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[11] One scholar notes that "it is critical to note that 'equitable jurisdiction' is not some formless field that gives all courts an implicit license to do as they please." Epstein, *Symposium: Bush v. Gore: "In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U.Chi.L.Rev. 613, 628 (2001). The author concludes that a federal court owes no deference to a state court's clear disregard of the instructions of a legislature acting under the similar delegation of Art. II, § 1. *Id.*, at 629.

[12] Mississippi law provides that "[t]he legislative power of the state shall be vested in a legislature." Miss. Const. Art. 4, § 33 (1890). As the District Court observed, App. 11a n.6, the courts are explicitly forbidden to exercise legislative power by Art. 1, § 2. Thus, contrary to intervenors' suggestion, Appellants' Brief at 27, Mississippi courts cannot be part of "the law-making . . . processes of the state." App. 13a.

[13] Indeed, even though intervenors do not challenge the remedy chosen by the District Court, they complain that "[t]he federal court made no pretense of adhering to the policies reflected in the state court's configuration." Appellants' Brief at 8.

This very practical consideration forecloses intervenors' reliance on *Wesberry v. Sanders*, *supra*. There, this Court held that the assignment of authority to Congress in Art. I, § 4 did not preclude the federal courts from enforcing the separate demands of Art. I, § 2 for equal representation. The Framers surely would have understood that any litigation to enforce Art. I, § 2 would be fully reviewable by this Court; even though Art. VI may permit state courts to entertain such federal claims, this Court retains the final authority. Thus, the fact that federal claims may be litigated notwithstanding Art. I, § 4 does not compel the conclusion that state claims, unreviewable in this Court, must be similarly permissible. Certainly, Framers like Pinckney, who feared "intrigues of a ruling faction in a state," would have been unwilling to surrender unreviewable authority to state judges.

The language, history, and prior application of Art. I, § 4 necessitate the conclusion that state courts may not impose congressional redistricting plans in adjudicating a claim brought under state law. As will be demonstrated, that is exactly what the Chancery Court did; the District Court acted properly in precluding enforcement of its judgment.

C. The Chancery Court, resolving a claim brought solely under state law, improperly substituted its own plan of elections to Congress in place of two statutes adopted in accordance with the method the State has prescribed for legislative enactments.

Intervenors argue that the Chancery Court had the power to entertain their complaint, brought solely under Mississippi law, and to impose a remedy requiring state election officials to comply with federal law as the Chancery Court construed it. In Part I.B of their brief, they assert that the remedy imposed here did not usurp the Mississippi Legislature's power under the Elections Clause because the Legislature retains the power to adopt a

different redistricting plan. Part I.C argues that, because federal courts may entertain federal claims attacking state regulations to Congress, state courts must be able to do the same. Part I.D concludes, in misplaced reliance on *Hathorn v. Lovorn*, 457 U.S. 255 (1982), that state courts are obliged to impose a remedy required by federal law even when no federal claim is asserted in the complaint. None of this establishes that state courts acting under state law may displace the decisions of legislatures acting pursuant to federal constitutional delegation.

By ordering state election officials to execute the redistricting plan devised by intervenors as plaintiffs in the Chancery Court, App. 132a, the judgment precluded the enforcement of two statutes adopted by the Legislature under the power delegated by Art. I, § 4. In 1991, the Legislature had adopted Miss. Code Ann. § 23-15-1037 (Rev. 2001), establishing five districts; that statute plainly became unenforceable after the 2000 census when Mississippi's delegation was reduced to four members. However, decades earlier, the Legislature had adopted Miss. Code Ann. § 23-15-1039 (Rev. 2001), calling for Representatives to be elected at large in the event that Mississippi should lose a seat and fail to redistrict. Certainly, the Legislature retains its power under Art. I, § 4, and can adopt a new redistricting plan if both Houses and the Governor agree and if the appropriate federal authority grants approval under § 5 of the Voting Rights Act of 1965. The fact remains, however, that the State successfully ran that gauntlet in 1986 when § 23-15-1039 was reenacted and approved, 1986 Miss. Gen. Laws ch. 495, § 308, but the Chancery Court nevertheless ignored it in substituting its own plan. Here, the Legislature did not default in its duty, but prescribed in advance for the consequences of a political deadlock; the Chancery Court simply chose to do something else.

Disregard of a legislative judgment potentially raises questions about both the legitimacy of the courts and the fairness of the electoral process. It has been suggested that one reason for the similar delegation of power to legislatures in Art. II, § 1 is that "legislatures, in contrast to

courts and executive officials, must enact their rules in advance of any particular controversy. A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates." McConnell, *Symposium: Bush v. Gore: Two-and-a-Half Cheers for Bush v. Gore*, 68 U.Chi.L.Rev. 657, 662 (2001). The author goes on to explain why federal authorities should enforce respect for legislative decisions:

> Thus, there is wisdom in the provision of Article II, which places authority to set electoral rules in the institution least able to manipulate the rules to favor a particular candidate. . . . [I]n this unique context, there is a constitutionally based federal interest in ensuring that state executive and judicial branches adhere to the rules . . . established by the legislature, and do not use their interpretive and enforcement powers to change the rules after the fact.

Id., at 663.

Here, the Chancery Court may not have manipulated the rules, but intervenors certainly did. The Chancery Court's judgment displacing two acts of the Legislature was founded on a peculiar complaint which never mentioned those statutes at all. The state law claim which intervenors asserted in Chancery Court alleged that the Legislature's Standing Joint Congressional Redistricting Committee had failed to comply with Mississippi statutes requiring a production of a redistricting plan by early December. J.App. 13-14. The remedy they sought, however, was not the enforcement of the Legislature's duty to redistrict in a timely fashion, but the displacement of the Legislature by "adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi." J.App. 15. At no point in their complaint did intervenors claim that the statutes prescribing existing districts or requiring elections at large violated state law or any other law.

Neither in their brief nor at any other place in this record have intervenors ever asserted that their Chancery Court complaint "aris[es] under the Constitution, laws, or treaties of the United States," within the meaning of 28 U.S.C. § 1331. Were that the case, the state court defendants would have been able to remove it to federal court under 28 U.S.C. § 1441(a), and intervenors apparently did not want that to happen.[14] Indeed, intervenors affirmatively rejected any federal claim. Resisting a motion to dismiss, they told the Chancery Court that "our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law." J.App. 19 n.3. Responding to the contention that § 23-15-1039 requires Representatives to be elected at large, they specifically disclaimed any implication that their claim arose under federal law. "We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution." *Id.*[15] Indisputably, the Chancery Court complaint asserted no federal claim.

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[14] The Fifth Circuit does not permit removals of complaints which attempt to assert claims under state law, even where a plaintiff's only possible claim arises under federal law. In *Waste Control Specialists, LLC, v. Envirocare of Texas, Inc.*, 199 F.3d 781 (5th Cir. 2000), defendants removed a complaint purporting to state a claim under the Texas antitrust statute. The District Court denied remand, finding that the complaint alleged only a conspiracy which was entirely interstate in nature; while these allegations might state a claim under federal antitrust law, the Texas law applied only to intrastate conspiracies. *Id.*, at 783. The Fifth Circuit reversed, finding it irrelevant whether a state claim actually existed. *Id.*, at 784. Thus, the status of removal law in the Fifth Circuit explains the practical relevance of the fact that, as intervenors concede, their complaint in Chancery Court "mentioned no provisions of federal law." Appellants' Brief at 23.

[15] Although intervenors disparaged § 23-15-1039 in their brief in Chancery Court, they neither attacked it in their complaint nor pursued their argument at trial. The Chancery Court made no finding that § 23-15-1039 was unenforceable; it simply ignored it.

Certainly, it may be necessary for state courts to resolve certain issues of state law in the process of adjudicating a federal claim. In *Davis*, the Supreme Court of Ohio "held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution." 241 U.S. at 567. Relying on that interpretation of state law, this Court held that the decision to give effect to that referendum was consistent with the power delegated by Congress under the controlling statute. *Id.*, at 568-69. Indeed, before any state regulation can be enforced, it would seem to be necessary for a Court to conclude that it has been adopted "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367-68. However, because no authority to regulate congressional elections can exist except for that delegated by Art. I, § 4, the only possible state law claims should concern the procedural propriety and the substantive enforcement of a legislature's exercise of the authority delegated by the Elections Clause. Here, intervenors did not plead and the Chancery Court did not find that the two Mississippi statutes superseded by its judgment had not been properly enacted or that election officials would not properly enforce them. Instead, the Chancery Court, purporting to adjudicate a different state law claim, simply ignored the Legislature's regulations and imposed its own. No precedent of this Court suggests that a state court has any such power.

It is true that a state court adjudicating a state law claim must take care that its remedy complies with federal law. That is all that this Court held in *Hathorn v. Lovorn*, *supra*, upon which intervenors rely. There, plaintiffs sought to enforce a statutory regulation of local elections, but the Chancery Court found that it had not been properly adopted under Mississippi law. The Supreme Court of Mississippi reversed and ordered the statute enforced. 457 U.S. at 258-59. This Court simply held that the remedial order could not be enforced absent compliance with federal law. "When a party to a state proceeding asserts that § 5 [of the Voting Rights Act] renders the contemplated relief unenforceable, therefore, the state court must examine the

claim and refrain from ordering relief that would violate federal law." *Id.*, at 269-70.

All parties to this litigation agree that any remedial order entered by any state court on any claim must always comply with federal law; that duty, however, does not establish the authority to issue any remedial order in the first place. Contrary to intervenors' contention, Appellants' Brief at 26, this case does present the question of whether a state court acting under state law may invalidate a plan, properly adopted under state legislative procedures, that otherwise complies with federal law.[16] Because the Elections Clause delegates no such power to state judicial authorities, the Chancery Court had no power to replace the legislative plan with its own, even if its plan might otherwise comply with federal law.

Intervenors contend that affirmance "will leave courts of the vast majority of the states devoid of any authority to hear congressional redistricting cases and adopt congressional redistricting plans," Appellants' Brief at 20, but intervenors are wrong. Under *Smiley*, any state court can adjudicate any federal challenge to a state regulation of elections to Congress, unless that court is somehow prohibited from doing so by operation of § 5 of the Voting Rights Act.[17] Here, intervenors did not challenge the two

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[16] The old statutory five-district plan, of course, is no longer enforceable, but the at-large requirement of § 23-15-1039 is fully consistent with federal law as set forth in 2 U.S.C. § 2a(c)(5). As plaintiffs and the Republican Executive Committee have demonstrated in their cross-appeal, *Smith v. Branch*, No. 01-1596, the federal statute remains in full force and effect.

[17] There is no indication that any of the recent state court cases on which intervenors rely, Appellants' Brief at 20, were decided on state law alone. Most of the opinions indicate only that plaintiffs presented constitutional claims, without specifying whether they arose under state or federal law. *Beauprez v. Avalos*, 42 P.3d 642, 645 (Colo. 2002); *Zachman v. Kiffmeyer*, 629 N.W.2d 98 (Minn. 2001); *Perry v. Del Rio*, 67 S.W.3d 85, 87 (Tex. 2001). In Oregon, however, the trial court explicitly stated that "the plaintiffs challenge the constitutionality of the existing United States congressional districts in Oregon under the Federal

(Continued on following page)

applicable Mississippi statutes under either federal or state law; instead, under the guise of seeking enforcement of statutes governing legislative procedures, they obtained a judicial regulation of congressional elections that displaced the legislative choice. In disapproving such a result, the District Court did nothing to inhibit straightforward litigation of state and federal redistricting claims in any other court.

D. The District Court's ruling does not contravene *Growe v. Emison*.

As the District Court found, App. 18a, the issue of whether a state court's resolution of a redistricting dispute is consistent with Art. I, § 4 was not raised or decided in *Growe v. Emison*, 507 U.S. 25 (1993). As this Court has recently said, "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). *Accord*, *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). The issue is therefore one of first impression.

Moreover, the District Court's judgment is consistent with the result in *Growe* for two separate reasons. First, the Minnesota court, unlike the Chancery Court here, adjudicated a federal claim; other state courts will remain free to do the same. Second, the Chancery Court here acted in defiance of the legislative will as expressed in

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Constitution." *Perrin v. Kitzhaber*, No. 0107-07021, slip op. at 1 (Cir. Ct. of Multnomah Cty., Ore., Oct. 19, 2001). Likewise, in New Mexico the trial court ruled, "The current New Mexico congressional districts violate Art. I, § 2 of the Constitution of the United States." Order re: Amendment to the Court's Findings of Fact and Conclusions of Law Filed January 2, 2002, *Jepsen v. Virgil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M., Jan. 2, 2002). In Oklahoma, plaintiffs relied only on federal law. *Alexander v. Taylor*, 2002 Ok. 59, 51 P.3d 1204, 1207 (2002). So far as appears, intervenors are the only litigants in the country who have chosen to rely only on state law in pressing their claims.

§ 23-15-1039; the District Court's opinion left open the possibility that other legislatures might delegate redistricting authority to their courts.

Although the complaint filed by intervenors in Chancery Court asserted no claim under federal law, the Minnesota pleadings in *Growe* were entirely different:

> In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution.

507 U.S. at 27. Appellants suggest that *Growe* holds the precise nature of the claim to be irrelevant to a state court's authority to adjudicate congressional redistricting claims. However, when this Court in *Growe* stated that *Scott v. Germano*, 381 U.S. 407 (1965), "does not require that the federal and state-court complaints be identical," 507 U.S. at 35, it was addressing the obligation of a federal court to defer to state proceedings, not the jurisdiction of the state court. *Growe* held that the federal plaintiffs' assertion of a claim under the Voting Rights Act did not allow them to proceed to the exclusion of the federal constitutional claim being asserted in state court. This Court did not hold that a federal court would be required to abstain in favor of a state law attack on a congressional redistricting plan or that a state court could entertain such an attack consistent with Art. I, § 4.[18]

The District Court also considered whether Minnesota's Legislature may have created statutory authority for its courts to hear such cases. The Court noted that in

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[18] *Germano*, of course, concerned only legislative redistricting. Thus, it cannot support a contention that state courts can or must adjudicate congressional redistricting claims.

Cotlow v. Growe, 622 N.W.2d 561 (Minn. 2001), the Supreme Court of Minnesota relied on two statutes giving its Chief Justice authority to make special assignments in special cases. App. 16a. Concluding that its interpretation of Art. I, § 4 was not precluded by this Court's precedents, the District Court remarked that "there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." App. 18a.

Whether or not the District Court was correct in suggesting that Minnesota's courts may have had legislative authority to proceed, there can be no disputing its conclusion that Mississippi has "no legislative act on which to base the chancery court's authority to act in congressional redistricting." App. 19a.[19] When the Mississippi Legislature fails to redistrict itself or the Circuit or Chancery Courts, Mississippi's Constitution assigns secondary authority respectively to a special commission and to the Supreme Court. Miss. Const. Art. 6, § 152 (1890); *id.*, Art. 13, § 254. "There is no similar legislative grant for redistricting congressional districts." App. 19a.

It is certainly true, as intervenors note, that Art. 6, § 159 of the Mississippi Constitution confers upon the Chancery Court "full jurisdiction in . . . [a]ll matters in equity." Appellants' Brief at 28. It is equally true that judges who would have been acquainted with the framers of that Constitution held 70 years ago that "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield v. Brock*, 169 Miss. 784, 142 So. 745, 746 (1932). Neither the framers nor the legislators who adopted the general jurisdictional statute, Miss. Code Ann. § 9-5-81 (Rev. 1991), intended to delegate redistricting authority to the Chancery Court. While the Supreme Court purported to confer that authority in *In re Mauldin*, the District Court properly observed that it "did

[19] This Court will ordinarily accept the lower court's reading of state law. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985).

not point to any legislative authority that authorized the chancery court to act." App. 21a.

In fact, the Legislature expressly considered its potential failure to agree on a redistricting plan, and, rather than delegating authority to the courts, chose in § 23-15-1039 that, under the circumstances presented here, all Representatives should be elected at large. Thus, the situation here resembles that decried by the three concurring Justices in *Bush v. Gore*, 531 U.S. 98 (2000). Just as Art. I, § 4 delegates to legislatures the power to prescribe rules for conducting elections to Congress, Art. II, § 1 grants them the authority to direct the manner of election of presidential electors.[20] Here, as in *Bush*, "the clearly expressed intent of the legislature must prevail." *Id.*, at 120 (Rehnquist, C.J., concurring). In imposing its own redistricting plan, the Chancery Court unconstitutionally disregarded that clear intent, as set forth in § 23-15-1039.

The District Court specifically left open the possibility that a legislative delegation of congressional redistricting authority might pass constitutional muster. It noted that a delegation to a special commission had been held constitutional under Art. I, § 4 by the Supreme Court of New Jersey in *Brady v. New Jersey Redistricting Comm'n*, 131 N.J. 594, 622 A.2d 843 (1992). App. 22a-23a n.13. Thus, affirmance of the District Court's judgment will not resolve the question of whether other legislatures may delegate redistricting authority to their courts. It will merely establish that the Mississippi Legislature has not done so.

Thus, the District Court's judgment is not inconsistent with *Growe*, nor does it inhibit the ability of state legislatures and courts to resolve their own redistricting disputes. That judgment should be affirmed.

[20] As the three dissenting Justices observed, "It is perfectly clear that the meaning of the words 'Manner' and 'Legislature' as used in Article II, § 1, parallels the usage in Article I, § 4. . . . " *Id.*, at 123 n.1 (Stevens, J., dissenting).

II. BECAUSE NO MISSISSIPPI CONGRESSIONAL DISTRICTING PLAN HAS BECOME LAW, THE DISTRICT COURT PROPERLY IMPOSED A PLAN.

Intervenors offer no criticism of the redistricting plan adopted by the District Court. They make no contention that the District Court ignored constitutional requirements or the remedial principles announced by this Court's precedents. Rather, they claim only that there was no wrong to remedy, because a new redistricting plan for Mississippi had already taken effect. They assert that their plan was properly submitted by General Moore after its approval by the Chancery Court and that the letter of February 14, 2002, from the Chief of the Voting Rights Section of the Department of Justice was insufficient to toll the time for review under § 5 of the Voting Rights Act; they add that, in any event, the plan took effect when no objection was entered within 60 days after its resubmission on February 20, 2002. Appellants' Brief at 29. Because, as will be seen, intervenors' plan has not been precleared, the District Court's judgment imposing its own plan must be affirmed.

A. The District Court properly ruled that all three submitted changes required approval under § 5 of the Voting Rights Act.

General Moore's letter of December 26, 2001, to the Department of Justice submitted three changes for preclearance under § 5 of the Voting Rights Act: (1) intervenors' redistricting plan, as embodied in the Chancery Court's order of December 21, 2001; (2) the reassignment of jurisdiction over redistricting to the Chancery Court by the Supreme Court's order of December 13, 2001, in *In re Mauldin*; and (3) the judicial imposition of a redistricting plan to the extent that it departed from the at-large requirement of § 23-15-1039. App. 227a-229a. Intervenors admit that their redistricting plan required preclearance under § 5, but they deny that the other two submissions needed preclearance. In fact, all three changes are subject

to § 5. Because *In re Mauldin* had not been precleared, the Department of Justice and the District Court properly concluded that consideration of intervenors' redistricting plan itself was premature.

1. The order in *In re Mauldin* is enabling legislation under 28 C.F.R. § 51.15(b)(1).

The indispensable key to intervenors' statutory argument is that the Supreme Court's order in *In re Mauldin* is not a voting change which requires approval under § 5 of the Voting Rights Act. The District Court found to the contrary, and the Department of Justice seems to have agreed. The District Court stated that *In re Mauldin* "clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities." App. 97a.[21] *See also* App. 33a. The letter to General Moore from the Chief of the Department's Voting Rights Section described the order "that granted the Chancery Court of Hinds County jurisdiction to adopt and direct the implementation of a congressional redistricting plan" as a "change in voting procedure." App. 193a. Intervenors bewail at some length the supposedly dire consequences of that finding, but they offer no analysis of the statute or its implementing regulations which would undermine the conclusion reached by the District Court and the Department.

The broad reach of § 5 is well known. This Court has repeatedly stated that "Congress intended to reach any state enactment which altered the election law of a covered State

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[21] The Court observed that jurisdiction over challenges to redistricting plans had been rejected 70 years ago in *Brumfield*, *supra*, and *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 142 So. 747 (1932). Contrary to intervenors' suggestion, Appellants' Brief at 35, *Carter v. Luke*, 399 So.2d 1356 (Miss. 1981), *rev'd sub nom.*, *Hathorn v. Lovorn*, *supra*, was not a redistricting case, but an action to enforce a statute requiring election, not appointment, of school board members. 457 U.S. at 258.

in even a minor way." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). The Attorney General has confirmed this broad scope in the regulations implementing the statute:

> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

28 C.F.R. § 51.12. The regulations explicitly list redistricting decisions as being among those requiring preclearance. 28 C.F.R. § 51.13(e).

Deciding who shall have authority to make redistricting decisions may be one step removed from the redistricting itself, but it still falls within the scope of § 5. The regulations describe "enabling legislation" to include any provision "that enables or permits the State or its political subunits to institute a voting change." 28 C.F.R. § 51.15(a). Specific examples of such enabling legislation include:

> (1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13.

28 C.F.R. § 51.15(b)(1). *In re Mauldin* falls squarely within this definition.[22] The judges of Mississippi's Chancery Courts are "officials of the State," and *In re Mauldin* authorizes them "to institute [one] of the changes described in § 51.13," the preparation and imposition of redistricting plans. This Court has expressly approved the authority of the Attorney General to promulgate regulations implementing § 5, *Georgia v. United States*, 411 U.S.

[22] Although judicial orders would not generally be characterized as "legislation," all parties agree that voting changes are subject to § 5 even when ordered by courts, rather than by legislative authorities. *Hathorn v. Lovorn*, *supra*.

526, 536 (1973), and it has traditionally given great deference to his application of the Act. Because this Court could agree with the Attorney General that a city's annexation of a vacant lot requires approval under § 5, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), it should have no difficulty in agreeing here with the District Court and the Justice Department that the reassignment of redistricting authority to the Chancery Court constitutes a change affecting voting.

Pursuant to its regulations, the Department of Justice has consistently acknowledged that a transfer of redistricting authority is subject to § 5. In a document available for public review on the Internet, the Department continues to declare:

> Some transfers of authority between government officials . . . clearly have a direct relationship to voting if they concern authority over voting procedures, such as a change in who has authority to adopt a redistricting plan, conduct voter registration, or select polling place officials. *See, e.g.*, *Foreman v. Dallas County*, 521 U.S. 979 (1997).

Department of Justice, *About Section 5 of the Voting Rights Act*, "Section 5 Requirements," <http://www.usdoj.gov/crt/voting/sec_5/types.htm>. Although *Foreman* did not involve redistricting, it illustrates the importance of federal review of a change in decisonmakers. By using "party-affiliation formulas of one sort or another," Dallas County had changed its procedures for selecting election judges, "who supervised voting at the polls on election days," 521 U.S. at 980. Obviously, each election judge exercises a substantial amount of discretion in making decisions on election days; § 5 requires federal review of the procedures for selecting those judges so as to minimize the likelihood that they will exercise their discretion in a discriminatory fashion. So, too, state officials exercise a tremendous amount of discretion in adopting redistricting plans; it is equally important for federal officials to consider whether individual judges are more likely than the Mississippi Legislature to exercise that discretion in a discriminatory fashion.

The principle embodied in 28 C.F.R. § 51.15(b)(1) is fully consistent with this Court's decision in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). There, this Court held, "Changes which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.*, at 506. The Court, however, continued:

> To be sure, reasonable minds may differ as to whether some particular changes in the law of a covered jurisdiction should be classified as changes in rules governing voting. . . . When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment.

Id., at 509. As indicated from his public pronouncements and from the February 14 letter to General Moore, the Attorney General continues to believe that a reassignment of redistricting authority "should be classified as a change in a rule governing voting." *Id.* While not binding, his judgment is one to which this Court may reasonably defer, as it did in *Foreman*.[23] *See also United States v. Louisiana*, 952 F. Supp. 1151, 1165-68 (W.D. La.) (*Presley* does not foreclose Attorney General's determination that a city court is a subunit of a city under 28 C.F.R. § 51.13(e)), *aff'd mem.*, 521 U.S. 1101 (1997).

[23] The dissent in *Presley* identified several transfers of authority which had been found subject to § 5, including "a transfer of voter registration duties from the county clerk to the county tax assessor." *Id.*, at 512 n.3 (Stevens, J., dissenting), quoting Brief for United States as *Amicus Curiae* 16 n.6. Likewise, in *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983), the Attorney General had approved a South Carolina statute transferring the bulk of local decisionmaking authority, including the authority to select a form of government and to establish election districts, from the state to the county. The three-judge court unanimously agreed that "the shift of power from the Governor and the General Assembly to the new County Council" constituted a change affecting voting. *Id.*, at 702. This Court's opinion in *Presley* did not repudiate either of these precedents.

Deference to the Attorney General's judgment is unlikely to have the broad effects predicted by intervenors. Many state courts have litigated voting rights claims of various descriptions over the last four decades, but most such claims have arisen under federal law, not state law. Here, neither the District Court nor the Department of Justice decided that a state court must obtain preclearance under § 5 before adjudicating a federal claim. The much narrower principle actually established by this case will control only claims in state court arising under state law.

Intervenors, supported by their amici, complain that the Attorney General's judgment is entitled to no deference because he failed to question the jurisdiction of a state court in North Carolina adjudicating a challenge under state law to legislative redistricting under authority confirmed by that State's Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002). Plaintiffs and the Republican Executive Committee, of course, have no way of knowing why the Department of Justice considered the expansion of the Chancery Court's jurisdiction in Mississippi to be a change covered by § 5 without raising a similar question about the jurisdiction of the North Carolina court.[24] The answer may be as simple as the fact that Attorney General Moore in his submission letter of December 26, 2001, raised the question of whether *In re Mauldin* constituted a covered change, App. 227a-228a,

[24] Nor is this Court in a position to determine whether the Department's handling of the Mississippi submission constitutes "unwarranted administrative conduct," *Georgia v. United States*, *supra*, 411 U.S. at 541 n.13, in light of intervenors' failure to place before District Court anything resembling an administrative record. The public is encouraged to comment on submissions pursuant to 28 C.F.R. § 51.29, and, while some of those comments may be kept confidential, the Department has authority to release others under 28 C.F.R. § 51.36. The Mississippi Republican Executive Committee filed copies of its comments with the District Court, but intervenors submitted neither their own communications with the Department nor those of anyone else.

while Judge Jenkins's letter submitting the North Carolina redistricting plan raised no such issue of judicial authority. NAACP Brief at 3a-4a. Moreover, the District Court here held *In re Mauldin* to constitute a change within the scope of § 5 on January 15, 2002, App. 97a, while none of the opinions in *Stephenson* offered any suggestion of a departure from prior North Carolina practice. Indeed, so far as appears from the record, no one called to the Department's attention the possibility that the assumption of jurisdiction by the North Carolina courts might require approval under § 5.

Even if the Department was aware of the potential issue, it may be that no inquiry was made for the simple reason that the State of North Carolina, unlike the State of Mississippi, is not a jurisdiction covered by § 5 of the Voting Rights Act; rather, 40 of its individual counties are covered jurisdictions subject to § 5. *Stephenson*, *supra*, 562 S.E.2d at 385. The Department's regulations require a change to be submitted by "the jurisdiction that has enacted or seeks to administer the change." 28 C.F.R. § 51.10. The premise of intervenors' argument is that North Carolina enacted a change when its Supreme Court "authorized the courts to adopt a statewide redistricting plan," Appellants' Brief at 42, but North Carolina is not a jurisdiction which must submit its enactments under § 5 and the governing regulations. Rather, it is the covered county which "seeks to administer the change," although 28 C.F.R. § 51.23(a) permits a submission to be made on a county's behalf by a state officer like Judge Jenkins. The only change which the covered North Carolina counties seek to administer is the final redistricting plan itself, not the process by which it was adopted. Whether or not these distinctions between Mississippi and North Carolina are ultimately persuasive, they are weighty enough that it cannot be said that the North Carolina preclearance "proves that the Department was disingenuous in delaying

[the Mississippi] preclearance decision on that basis." Appellants' Brief at 41.[25]

Because *In re Mauldin* falls within the plain language of 28 C.F.R. § 51.15(b)(1), and because intervenors have shown no reason to disregard the determination of the District Court and the Department of Justice, this Court should conclude that preclearance of the decision of the Supreme Court of Mississippi is required under § 5.

2. The Chancery Court's unexplained disregard of the at-large election requirement of Miss. Code Ann. § 23-15-1039 is a voting change.

The Mississippi Legislature, in § 23-15-1039, has provided a rule for conducting elections whenever it fails to adopt a redistricting plan after a change in the size of the delegation. The applicable language provides that, "if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large." In ordering its own redistricting plan into place, the Chancery Court simply ignored this statute. It did not find the at-large mandate to be unconstitutional or inapplicable; it simply failed to address it at all.

The District Court, by contrast, held that the Chancery Court's disregard of § 23-15-1039 constituted a change from prior Mississippi law. The Court unequivocally stated that "the Chancery Court's judgment adopting a congressional redistricting plan is a change . . . from the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for

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[25] Still less can it be said that "political motives seem to be the only rational explanation for the difference in treatment," Appellants' Brief at 44, between the request here for additional information on February 14, 2002, and the approval of submissions from other states. Given the complex issues presented by the three separate changes encompassed by General Moore's submission, the Department did well to formulate a response as quickly as it did.

circumstances such as the present ones." App. 98a. In its letter to General Moore of February 14, the Department of Justice implicitly recognized that a change had been made. With regard to the reassignment of redistricting power to the Chancery Courts, the letter requested, "Please explain the State's view of the relationship between this change in voting procedure and Miss. Code Annot. 23-15-1039." App. 193a-194a.

Intervenors' contention that the District Court and the Justice Department misunderstood the statute is purest sophistry. Noting the statute's application to elections held "before the districts shall have been changed to conform to the new apportionment," intervenors contend that the districts changed "[o]nce the state court adopted a plan," Appellants' Brief at 38, thus removing the precondition for the application of the statute. Of course, changes in Mississippi districts "are not now and will not be effective as laws until and unless cleared pursuant to § 5." *Connor v. Waller*, 421 U.S. 656 (1975). Had the Chancery Court accepted intervenors' construction of § 23-15-1039, it should still have instructed state officials to conduct at-large elections until such time as a redistricting plan had been properly approved.

The District Court construed § 23-15-1039 according to its plain meaning and found that the enforcement of intervenors' plan would constitute a change from that meaning. Intervenors offer no good reason for this Court to reject the District Court's common-sense reading of the statute. For this Court to accept their fanciful construction of the statute would violate its ordinary procedures. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Regents of University of Michigan*, *supra*, 474 U.S. 224 n.10, quoting *Propper v. Clark*, 337 U.S. 472, 486-87 (1949), and citing cases. *Accord*, *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Although the District Court's judgment has not had the benefit of review by the Court of Appeals, it is

noteworthy that all three judges accepted this reading of Mississippi law.

It beggars belief to suppose that the Mississippi Legislature intended § 23-15-1039 to apply only when a court had failed to redistrict the state. The statute in its present form goes back at least as far as the first code following the adoption of Mississippi's present Constitution of 1890. 1892 Miss. Code § 3690. At that time there was no precedent whatsoever for the drawing of congressional districts by a court. Mississippi's rejection of such a practice was confirmed in *Brumfield* and *Wood*, *supra*, which remained good law until *In re Mauldin*.

Nor is there any basis for intervenors' contention, Appellants' Brief at 38-39, that *In re Mauldin* authoritatively adopted their construction of § 23-15-1039. The Supreme Court merely declared that "[a]ny redistricting plan adopted by the chancery court . . . will remain in effect," pending further action by the Legislature. App. 111a. It did not order the Chancery Court to adopt a plan at all, much less to disregard the plan specified by § 23-15-1039. In any event, the District Court was fully aware of *In re Mauldin* when it rejected the construction of § 23-15-1039 put forward by intervenors.

For these reasons, the District Court properly concluded that enforcement of intervenors' redistricting plan would constitute a change from the law prescribed by § 23-15-1039.

B. The District Court properly agreed with the Department of Justice that consideration of intervenors' congressional redistricting plan was inappropriate under 28 C.F.R. § 51.35.

The Attorney General is obliged under § 5 of the Voting Rights Act to consider changes in election law properly submitted by state authorities. All parties recognize that the Attorney General's power to prescribe reasonable regulations to govern that process was confirmed by this Court in *Georgia v. United States*, *supra*. Intervenors nevertheless

contend that the application of those regulations by the Department of Justice in this case was so arbitrary and unnecessary that their congressional redistricting plan became effective 60 days after General Moore submitted it. Intervenors are wrong.

The regulations quite reasonably describe the sorts of changes which may be submitted for consideration, as well as the time of proper submission. In 28 C.F.R. § 51.35, the regulations provide for the disposition of improper submissions. The Department's letter of February 14 invoked this provision in refusing to consider appellants' redistricting plan:

> Because the December 13, 2001 Order of the Mississippi Supreme Court (In re Mauldin No. 2081-M-01891), and the December 21 & 31, 2001 Orders of the Chancery Court which adopted a redistricting plan, are directly related, it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court. See 28 C.F.R. 51.22(b); 51.35.

App. 192a. The former provision mentioned in the letter concerns premature submissions, which it defines to include "[a]ny proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance." 28 C.F.R. § 51.22(b). In other words, because the Chancery Court's authority to impose a redistricting plan had not yet received preclearance under § 5, it was premature for the state to submit for consideration the plan which the Chancery Court had adopted.

There is nothing arbitrary or improper about the Department's application of its regulations in this case. The District Court approved the Department's finding that it could not "make a determination considering the Chancery Court plan until it receives the requested information and makes a decision on whether to approve the assignment of

jurisdiction to the Chancery Court." App. 33a n.3.[26] Until the Attorney General approves the Chancery Court's assumption of jurisdiction, the Chancery Court's approval of intervenors' plan carries no more weight than the approval by intervenors themselves.

In attacking the Department's February 14 request for information regarding the effect of *In re Mauldin*, intervenors fail to carry the heavy burden of showing that the Department has engaged in "unwarranted administrative conduct," as described in *Georgia v. United States*, 411 U.S. at 541 n.13. Indeed, they do nothing more than restate their earlier objections that *In re Mauldin* should not be considered a change in the first place. If reassignment of electoral authority among state officials can ever be subject to § 5, as *Foreman* holds, then it can hardly be frivolous for the Department to investigate the possible consequences of that reassignment. Indeed, because a determination by the Department that *In re Mauldin* constitutes a covered change would not be subject to judicial review by the District Court, *Morris v. Gressette*, 432 U.S. 491, 506-07 & n.24 (1977),[27] that Court was in no position to determine whether its questions related to that issue could be unwarranted.

Intervenors' argument is based upon their misreading of *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000). That case does not hold that all submissions must be

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[26] For that reason, it is hardly surprising that, as intervenors' amici complain in Part E of their brief, the Department's questions did not mirror its published guidelines on redistricting. The Department was reviewing the change in the Chancery Court's jurisdiction, not the redistricting plan itself.

[27] Apparently, in an enforcement action brought by the Attorney General under § 12(d) of the Act, 42 U.S.C. § 1973j(d), a covered jurisdiction may defend on the basis that the challenged practices do not constitute covered changes under § 5. *Georgia v. United States*, *supra*, 411 U.S. at 531-35. There appears to be no reported case in which a private litigant has been permitted to challenge the Department's determination that a change is covered by § 5.

approved where no retrogression, actual or intended, is shown; the holding is limited to "§ 5 in its application to vote-dilution claims." *Id.*, at 328. Retrogression is the touchstone for evaluating intervenors' redistricting plan, but it is not the sole consideration in reviewing the reassignment of redistricting authority effected by *In re Mauldin*.

As noted above, reassignments of electoral authority are important because election officials exercise discretion. Intervenors are certainly correct that retrogression can be forestalled by § 5 review of the redistricting plan itself. However, in any redistricting process, there are many potential plans which do not constitute retrogression. The selection among those plans is an exercise of discretion, and that discretion can be exercised in a discriminatory fashion. Where redistricting authority is reassigned, § 5 review is necessary to assure that the reassignment does not make discrimination more likely in the exercise of that discretion. All of the Department's questions in its February 14 letter are plainly directed toward that end.[28]

Finally, even if this Court were to accept intervenors' contention that the February 14 letter was insufficient to toll the running of the 60-day period, the only effect would be the approval of *In re Mauldin*. The time for consideration of intervenors' redistricting plan itself was not tolled; it never started. The Department's declaration, approved by the District Court, was that the submission of the plan was premature under § 51.22(b) until *In re Mauldin* had been approved. If intervenors are correct that *In re Mauldin* has

[28] In *Garcia v. Uvalde County*, 455 F. Supp. 101 (W.D.Tex. 1978), *aff'd mem.*, 439 U.S. 1059 (1979), upon which intervenors' amici rely, the District Court did not hold that the Attorney General's questions were insufficient to toll the running of the 60 days. Rather, the Court construed the regulations as precluding tolling more than once by the submission of successive requests for information. 455 F. Supp. at 105. Here, the Department submitted only a single request for additional information.

now been approved by operation of law, then the consideration of their redistricting plan may begin. The District Court was plainly correct in concluding, App. 33a-34a & n.3, that the plan had not gone into effect.

C. The Department's April 1 letter properly found that consideration of any submission was premature.

Intervenors are wrong in contending that the Department's failure to object within 60 days after submission of General Moore's second letter on February 19, 2002, App. 201a, constitutes the approval necessary under § 5. Long before the 60 days had expired, the Department responded once again to his submission. The Department's letter of April 1, 2002, again found the submission to be premature:

> Where voting changes submitted by the State have been enjoined by a federal court, they are presently incapable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35).

J.App. 29. General Moore has never contested the Department's finding that the submission is premature. Although this Court has acknowledged the possibility that the Attorney General's refusal to consider a submission might be invalid where "unwarranted administrative conduct may be shown," *Georgia v. United States*, *supra*, 411 U.S. at 541 n.13, no case has ever overridden the Attorney General's judgment in that regard. At no point in their brief do intervenors acknowledge the heavy burden they must bear.

Instead, they invoke the language of § 5, declaring, "The State of Mississippi, whose courts have ordered implementation of the state court plan, clearly has 'enact[ed] or seek[s] to administer' that plan." Appellants'

Brief at 30. But the words of § 5 simply will not bear the meaning intervenors ascribe to them. In Mississippi only the Legislature may "enact" law. Miss. Const. Art. 4, § 33 (1890). Certainly, the Chancery Court did not "seek to administer" a congressional redistricting plan; it ordered Governor Musgrove, General Moore, and Secretary Clark to do that.[29] However, there is no indication from the record that these three defendants still "seek to administer" intervenors' congressional redistricting plan. They certainly do not "seek to administer" that plan now, in the face of the District Court injunction to the contrary, which none of the official defendants have appealed. The Department's April 1 letter told them that this Court's injunction placed them outside the reach of § 5, because the submitted changes "are not presently capable of administration." Under the unusual circumstances of this case, the Department's application of § 5 and its implementing regulations can hardly be considered to be "unwarranted administrative conduct." *Georgia v. United States*, *supra*, 411 U.S. at 541 n.13.[30]

It is important to note that General Moore and his colleagues no longer claim that they "seek to administer"

[29] It is when state officials "seek to administer" a court order that their efforts require approval under § 5. In *Hathorn v. Lovorn*, 457 U.S. at 257, this Court considered the "implementation of a change in election procedures." Thus, it is not the "enactment" of a court order, but its "implementation" which brings it within the language of § 5.

[30] As the Court can easily see, intervenors have taken out of context the pronouncement that "compliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General." *Morris v. Gressette*, *supra*, 432 U.S. at 502 (emphasis in original). There, the South Carolina redistricting plan for its state Senate had unquestionably been properly submitted, and the Attorney General had affirmatively declared "that he would not interpose an objection to the new plan." *Id.*, at 497. *Morris* simply held that the propriety of that approval was not subject to further judicial review. *Id.*, at 507. Neither *Morris* nor any other case reviews the propriety of the Attorney General's explicit judgment that a submission may not be properly considered.

intervenors' redistricting plan. They did not take issue with the Justice Department's finding in its April 1 letter that the plan could not be administered. If they had continued to "seek to administer" the plan, the law would have given them at least two options. First, they could have asked the Justice Department through administrative means to reverse its determination and to proceed with consideration of the plan. Second, they could always file suit in the District Court for the District of Columbia to seek approval, as § 5 permits. Thus, the Department's determination that the plan had not been properly submitted will not lead to an unreviewable and permanent blockade of state policy.

To accept intervenors' contrary position, however, could lead to real difficulties. Congress intended for all voting changes to have the careful consideration of the District Court in the District of Columbia or of the Attorney General before taking effect. Here, the Attorney General has refused to review a change in election law, and state authorities have acquiesced in that determination. To permit private citizens to appear in court after the sixtieth day to seek a declaration of approval could frustrate the congressional mandate for careful review and place a potentially pernicious plan into effect.[31] Whatever the merits of this plan, this Court should not encourage such a contravention of established procedures.

Because intervenors have not shown the April 4 letter to be an improper application of § 5 and its implementing

[31] Indeed, it seems unlikely that intervenors would have standing as plaintiffs to seek a declaration that § 5 has been satisfied. In *Allen*, this Court acknowledged private "standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to § 5." 393 U.S. at 555. There appears to be no precedent where this Court has allowed a private party to seek an injunction requiring enforcement of a change that has been approved under § 5. Where the official defendants actually subject to the District Court's injunction do not dispute its resolution of the § 5 issue, there is no good reason to allow intervenors to do so.

regulations, the District Court properly denied their motion.

CONCLUSION

For the reasons stated by plaintiffs and the Mississippi Republican Executive Committee in the Brief of Cross-Appellants in *Smith v. Branch*, No. 01-1596, this Court should reverse the judgment of the District Court and remand for entry of a judgment requiring the defendants to conduct elections for Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5). In the alternative, for the reasons stated herein, the judgment of the District Court should be affirmed.

Respectfully submitted,

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